In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1241

JUNIOR LEE GAMBILL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH COURT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the court of appeals (Pet. App. I) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 1969. The petition for a writ of certiorari was filed on April 9, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the evidence established entrapment.

STATEMENT

After a jury-waived trial in the United States District Court for the Middle District of North Carolina, petitioner, who was tried with co-defendants Bray and Bauguess, was convicted on two counts charging him with the removal, concealment, possession and sale of nontaxpaid whiskey (26 U.S.C. 5601(a)(12), 5205(a)(2), and 5604(a)(1)). He was sentenced to concurrent prison terms of three years, subject to the parole eligibility provisions of 18 U.S.C. 4208(a)(2). The court of appeals affirmed *per curiam* (Pet. App. I).

The government's only witness was Alcohol and Tax Tobacco agent Eckard, who testified that he was transferred by his superiors from Tennessee to the Middle District of North Carolina for the purpose of trying to make a case against petitioner and Bray by purchasing nontaxpaid whiskey from them under circumstances which would not violate the rules with respect to entrapment (Tr. 59-60, 78-79).[1]

Prior to meeting petitioner, Eckard had made two purchases of nontaxpaid whiskey from Bray, to whom he had been introduced by an informant named Benny. On August 29, 1968, Eckard, using the name Huffman, introduced himself to petitioner at the latter's home. Eckard told petitioner that he had been

[1] "Tr." refers to the transcript of proceedings at trial, a copy of which is on file with the Clerk of this Court.

buying whiskey from Bray but would like to buy it from someone else at a lower price (Tr. 35-36, 72-73). He said he had been informed that petitioner had whiskey to sell and offered to buy some. Petitioner said he did not have any whiskey (Tr. 40, 73-74). Petitioner then left Eckard and went to Colbert's store where his truck was parked. Upon returning, petitioner questioned Eckard about Benny.

Shortly thereafter the two men went to Colbert's store. Eckard asked petitioner if he could "help" him and petitioner replied "yes" (Tr. 41). Petitioner went outside to a car parked in the store parking lot. He returned in a few minutes, and motioned to Eckard to follow him (Tr. 41-42). The two men walked to petitioner's truck and petitioner said: "[T]here's a fellow in the bathroom that can help you" (Tr. 42). As they walked toward the bathroom Bauguess emerged and petitioner, pointing to Bauguess, said "This man will handle you" *(ibid.)*. Petitioner then walked away. In a conversation with Bauguess, Eckard agreed to buy twenty cases of whiskey at $20 per case (Tr. 43). When Bauguess departed to get the whiskey, Eckard went into the store and asked petitioner if he could buy more whiskey. Petitioner said: "Well, I don't like to sell it in these small lots. * * * I like to fool with hundred-case lots" (Tr. 44). He told Eckard that "$20.00 is the bottom price" (Tr. 54). Bauguess then returned with the whiskey. Eckard inquired of petitioner whether he should pay him or Bauguess. Petitioner indicated it would be "all right" to pay Bauguess (Tr. 46-47). The transaction was then completed.

On September 7, 1968, Eckard went back to petitioner's home and offered to buy more whiskey. Petitioner said that he had no whiskey and indicated that "that which I sold you last time was some extra that I had" (Tr. 49, 52, 55).

ARGUMENT

Petitioner contends that the evidence established entrapment because Eckard persisted in seeking to buy whiskey from him after he had first told Eckard that he had no whiskey to sell. However, the trial judge could properly find that petitioner was predisposed to sell illicit liquor and demurred at first only because he had not yet decided whether Eckard, a stranger, was a safe person with whom to deal.[2] Although Eckard took the initiative in asking to purchase whiskey from petitioner, it is clear that he did no more than provide petitioner with the opportunity to engage in the illegal activity. See *Sorrells* v. *United States*, 287 U.S. 435; *Sherman* v. *United States*, 356 U.S. 369; *Masciale* v. *United States*, 356 U.S. 386; *Lopez* v. *United States*, 373 U.S. 427, 434.

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[2] Petitioner left Eckard alone at his home after stating that he had no whiskey and went to Colbert's store. When he came back, he asked Eckard about Benny, the government informant, prior to agreeing to "help" Eckard buy whiskey. Later, when Eckard and petitioner were talking in the store, petitioner evinced some apprehension that Eckard "could pop a badge on me and be a Federal Agent." Eckard assured petitioner that he was not and petitioner said "I hope not" (Tr. 46).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROGER A. PAULEY,
Attorneys.

APRIL 1969.

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